Fall River Savings Bank *and* United Food & Commercial Workers Union, Local No. 1325, AFL-CIO-CLC. Case 1-CA-17528

March 12, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 12, 1981, Administrative Law Judge William F. Jacobs issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Fall River Savings Bank, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT unilaterally eliminate compensatory time off for overtime worked Saturdays or unilaterally institute a required 6-day workweek, without prior notice to and bargaining with United Food & Commercial Workers Union, Local No. 1325, AFL-CIO-CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, if requested by the Union to do so, rescind the mandatory 6-day workweek and reinstitute the practice of permitting com-

[1] In its exceptions, Respondent contends, *inter alia*, that the Administrative Law Judge was biased against Respondent, improperly shifted the burden of proof to Respondent, and disregarded important record evidence. After careful examination of the entire record, we find no evidence of bias on the Administrative Law Judge's part. As for the burden-of-proof allegation, Respondent relies on the last sentence in part B of the Administrative Law Judge's Decision where, after discussing the General Counsel's position and applicable case law, the Administrative Law Judge states that "unless Respondent's defenses, discussed *infra*, require a different conclusion, the General Counsel has proven a *prima facie* case." We do not believe that the Administrative Law Judge thereby imposed the burden of proof on Respondent, but rather was attempting to state that the General Counsel had established a *prima facie* case and Respondent therefore had the burden of going forward with evidence in support of its defense. Consistent with this construction, the Administrative Law Judge proceeded to consider Respondent's defenses and rebuttal evidence. Respondent also asserts that the Administrative Law Judge ignored extensive evidence of its past scheduling flexibility and testimony by Assistant Vice President Silva that when Boutin told her she was resigning, Silva asked Boutin "can't you work it out?" and Boutin replied, "no, I can't." Although the record shows that Respondent had made scheduling accommodations in the past, that evidence has little bearing in Boutin's case where the record reveals that Respondent, while aware of Boutin's problem with a 6-day workweek, made no meaningful attempt to work out an acceptable schedule with her. Aside from Silva's testimony, which falls short of even an offer to assist Boutin resolve her scheduling difficulty, Respondent remained silent and did not raise the matter during Boutin's remaining 2 weeks at the bank.

[2] The Administrative Law Judge included a broad cease-and-desist provision in his recommended Order. In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the Board held that such an order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. We find this case does not fall into the above category. We therefore substitute a narrow cease-and-desist provision for the broad one in the recommended Order and we conform the notice accordingly.

pensatory time off for overtime worked Saturdays.

WE WILL offer Louise Boutin immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered, plus interest.

FALL RIVER SAVINGS BANK

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge: This case was heard before me on January 15, 1981, at Boston, Massachusetts. The charge was filed on June 2, 1980 and amended on July 10, 1980, by United Food & Commercial Workers Union, Local No. 1325, AFL-CIO-CLC, hereinafter called the Union. The order consolidating cases,[1] amended complaint and notice of hearing issued July 18, 1980, alleging in pertinent part that Fall River Savings Bank, hereinafter called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by making unilateral changes in working conditions which resulted in the constructive discharge of employee Louise Boutin. The answer denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs were filed by the General Counsel and Respondent. Upon the entire record,[2] my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Massachusetts corporation, maintains its principal office and place of business in Fall River, Massachusetts, where it is engaged in the operation of a savings bank. In the course and conduct of its business, Respondent regularly purchases materials and supplies which are transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts. Respondent in the course and conduct of its business receives gross annual revenues in excess of $500,000 and annually purchases and receives supplies and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. Respondent admits and I find that it is and has been engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

On February 28, 1978, Local 1325 of the Retail Clerks International Association petitioned the National Labor Relations Board for certification as the bargaining representative for an appropriate unit of employees which included the individual involved herein. On April 28, 1978, a secret-ballot election was held which was inconclusive inasmuch as there were a number of challenged ballots cast which were sufficient to affect the outcome of the election. The number of challenges plus the fact that objections were filed required an investigation into both matters and, following said investigation, the Acting Regional Director for Region 1 issued a Report on Objections and Challenged Ballots recommending that all challenges and objections be overruled. On September 29, 1978, the Board ordered a hearing to resolve factual issues raised by certain of the challenges and objections.[4] On March 19, 1979, after 9 days of hearing, the hearing officer's report issued and on December 6, 1979, the Board issued a Supplemental Decision and Direction.[5] Pursuant to this Decision, certification of the Union as the exclusive collective-bargaining agent of the employees in the unit issued on December 20, 1979.

On December 26, 1979, the Union, through its president, John Barron, sent a letter to Respondent,[6] citing the certification and requesting that it name a date on which to initiate bargaining. On December 28, 1979, Louis Spetrini, the Union's secretary treasurer, sent a second letter to Respondent requesting certain employee information which it needed in order to prepare a contract proposal. On January 7, 1980,[7] Barron sent to Respondent a list of topics which were to be discussed during bargaining. The list included hours and overtime as subjects for discussion.

On January 10, 1980, Respondent sent the following reply to the Union:

Dear Mr. Spetrini:

---

[1] Consolidated with Case 1-CA-17453. The charge in said case was filed on May 2, 1980, and alleged violations of Sec. 8(a)(1), (4), and (5). Case 1-CA-17453 was settled prior to the hearing and the General Counsel's motion for severance was therefore granted. Following the granting of the motion for severance the allegations no longer relevant were deleted from the order consolidating cases, amended complaint and notice of hearing.

[2] The General Counsel's unopposed motion to correct the transcript is granted.

[3] *Fall River Savings Bank*, 250 NLRB 935 (1980), enfd. 649 F.2d 50 (1st Cir. 1981).

[4] 238 NLRB 1371 (1978).

[5] 246 NLRB 831.

[6] All union correspondence was addressed to Charles Murray, Respondent's president.

[7] Hereinafter, all dates are in 1980 unless otherwise indicated.

I am in receipt of communications from you concerning the commencement of collective bargaining with your Union.

As you know, it is the bank's position that the election conducted in April, 1978 was unlawful due to the Union's role of unlawfully using Supervisory Personnel to encourage and threaten employees into supporting the Union. The Fall River Savings Bank also maintains that the Assistant Branch Managers are supervisors whose votes cannot be counted.

Without in any way waiving the bank's right to assert these defenses in any proceeding before the National Labor Relations Board and the Courts, and without conceding that your Union is the lawfully certified collective bargaining representative of our employees, we will be pleased to meet with you for purposes of discussing matters of mutual concern. If you desire to meet with us on this basis, kindly contact our collective bargaining consultant,

Mr. Henry D. Marzilli
201 Wayland Avenue
Providence, Rhode Island 02906
Tel. 401-272-5064

to set a convenient date.

Very truly yours,
Fall River Savings Bank
/s/ Charles R. Murray
President

Thus, although Respondent advised the Union that it was taking the position that it had no obligation to bargain with the Union because the election was invalid, it also stated that it was willing to meet with the Union "for purposes of discussing matters of mutual concern." Meanwhile the Union filed a charge[8] (Case 1-CA-17011) alleging Respondent's refusal to bargain.

On January 15 Spetrini advised Respondent that the Union was ready and willing to enter into collective bargaining with it, and that he had scheduled a meeting with the Respondent's collective-bargaining consultant, Henry Marzilli, for January 22, terming the meeting, "the first collective bargaining session." Spetrini also advised Respondent of his intention to submit a contract proposal at the forthcoming meeting.

On January 17, Respondent advised Spetrini that Marzilli was authorized to meet with him subject to the terms set forth in the January 10 letter. On January 22, Spetrini met with Marzilli and asked him to enter into a recognition agreement. Marzilli replied that he was in no position to do so, that he would have to get back to Murray and then later to Spetrini. When Spetrini did not hear anything more from Marzilli, he wrote a letter to Murray on January 25 advising him of Marzilli's failure to keep his commitment to get back to him, informing him of his efforts to contact Marzilli and stating that the Union still represented Respondent's employees and desired both answers to its demands and the information requested earlier. Respondent never replied to the Union's January 25 letter and, although Spetrini put in a number of telephone calls to Marzilli's office over the next few weeks, his calls were never returned.

Meanwhile the refusal-to-bargain charge was processed. Complaint issued on January 29 and on March 17 the General Counsel filed directly with the Board a Motion for Summary Judgment. In a Decision and Order which issued on July 24 the Board found that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act and ordered it to bargain with the Union.[9] Respondent refused to comply with the Board's Order and petitioned the United States Court of Appeals for the First Circuit for review of the Board's Order. The Board cross-petitioned for enforcement of its order. On May 22, 1981, the court denied Respondent's petition and granted the Board's petition for enforcement.[10]

2. The unilateral change and constructive discharge

Louise Boutin was hired by Respondent as a teller at its Swansea, Massachusetts, branch on March 30, 1976. Initially, she worked 5 days per week including Saturday. In late August 1979, Boutin received a promotion to assistant branch manager[11] and was transferred to the Assonet branch. As assistant manager she continued to work a 5-day week and, as the practice was at the time for all employees, both tellers and assistant branch managers, if she worked Saturday she was entitled to another day off during the week or to be paid for the sixth day, at her option. Saturday work was voluntary although an employee who was scheduled for work on a particular Saturday was obligated to find a replacement and give 5 days' advance notice if she did not intend to work on her scheduled Saturday. Almost invariably throughout 1979 and 1980 Boutin opted to work a 5-day week rather than 6 days. During an exceptional period between September 29, 1979, and November 10, 1979, however, Boutin was required to work several 6-day weeks. She objected to working a 6-day week and voiced her dissatisfaction to her superior, Assistant Vice President and Personnel Officer Silva. She explained that, if as assistant branch manager she was expected to work a 6-day week, she would rather be demoted to teller and work a 5-day week. Silva advised Boutin to stay on as assistant branch manager and take up the problem of the 6-day week with her immediate supervisor, Branch Manager Joanne Johnson. Johnson, when approached by Boutin, attempted to find a replacement for Boutin to work the next two Saturdays but was unsuccessful so that Boutin worked 6 days each of those 2 weeks. Thereafter, however, the schedule was worked out so that Boutin was again able to work 5-day weeks.

In December 1979 Boutin's son became ill and the illness was of such a nature that frequent trips to the doctor's office and to the hospital were necessitated. Special care was also needed at home because of his condition. Because of the added burden occasioned by her son's ill-

[8] January 4, 1980

[9] 250 NLRB 938.

[10] 649 F.2d 50, *supra*.

[11] Assistant branch managers were determined by the Board to have been nonsupervisory employees. *Fall River Savings Bank*, 246 NLRB 831.

ness Boutin brought the matter to Johnson's attention and advised her that she did not want to work a 6-day week.

On February 28 a memorandum issued at the bank over Silva's signature requiring that either the branch manager or the assistant branch manager be present every Saturday. At a meeting shortly after issuance of this memorandum Boutin again advised Silva that she did not want to work a 6-day week. Silva replied that, if the branch managers and assistant branch managers could work things out by themselves, it would be all right. During this period Boutin continued to work a 5-day workweek which ordinarily included Saturdays.

On May 5 Silva issued another memorandum doing away with the practice of granting a weekday off for those individuals working Saturdays. In effect, the memorandum instituted a change in hours requiring a mandatory 6-day workweek whenever an individual was scheduled to work on a Saturday. Cancellation of the midweek day off was made effective as of May 12. The effect of the change brought about by the May 5 memorandum was to require Boutin to work two or more 6-day weeks per month.

When Boutin received her copy of the memorandum she called Silva on the telephone and told her that she was resigning because she did not want to work a 6-day week. Silva replied that Boutin should submit her resignation in writing. On May 12 Boutin complied with Silva's request and submitted her resignation clearly stating therein that she was resigning because of the change in working conditions which made overtime mandatory. The resignation was to be effective May 23. There were no further communications between Boutin and management concerning either her resignation or the reasons for it.

B. *The General Counsel's Position*

The General Counsel contends that Respondent was under a legal obligation to bargain with the Union regarding its decision to implement the mandatory 6-day workweek. Inasmuch as the Union was certified by the Regional Director on December 20, 1979, as the exclusive collective-bargaining agent of Respondent's employees in an appropriate unit to bargain on their behalf concerning wages, hours, and other terms and conditions of employment, there arose a duty on the part of Respondent to bargain with this duly elected representative of its employees. Respondent failed and refused to bargain with the Union despite its duty to do so under the certification and despite the Union's frequent attempts to get it to do so. As a result, complaint issued and the Board found Respondent in violation of Section 8(a)(5) and (1) of the Act. The Board's finding was ultimately upheld by the United States Court of Appeals for the First Circuit.

It has been found that the number of hours which an employee is required to work is a subject about which an employer is obligated to bargain and that the duty to bargain attaches when a union has won an election whether or not it has yet been certified. *Portsmouth Lumber Treating, Inc.*, 248 NLRB 1170 (1980). Similarly, it has been found that, when an employer unilaterally changes the hours of employment of its employees without consultation with the duly elected representative of those employees, the union, it is in violation of Section 8(a)(5) and (1) of the Act. *Gaska Tape, Inc.*, 241 NLRB 686 (1979); *J. P. Stevens & Co., Inc.*, 239 NLRB 738 (1978); *Wayne County Neighborhood Legal Services, Inc.*, 249 NLRB 1260 (1980). It appears, in accordance with the General Counsel's contention, and the law as stated in the above-cited cases, that Respondent is in violation of the Act.

The General Counsel contends that, where unilateral action is taken by an employer under these circumstances, the proper remedy is restoration of the *status quo ante*. In cases where unilateral changes were instituted in violation of Section 8(a)(5) and punishment meted out by the employer to employees who failed to comply with the new unilaterally imposed working conditions, the disciplinary actions meted out, as well as the changes in the working conditions, were both found violative of Section 8(a)(5) and (1) of the Act. *Murphy Diesel Company*, 184 NLRB 757 (1970), affd. 454 F.2d 303 (7th Cir. 1971). Thus, not only were the new unilaterally instituted changes in working conditions ordered to be revoked but injuries incurred by employees due to disciplinary measures taken as a result of the employer's attempt to enforce the unlawful rules were remedied. In a case involving an employer's unilateral changing of overtime requirements from voluntary to mandatory with the resultant termination of two employees, it was determined that not only was the change in working conditions violative of Section 8(a)(5) and (1) of the Act but also that the resultant terminations were similarly violative of the same section. The remedy ordered was restoration of the *status quo ante*; i.e., revocation of the new rule, as well as reinstatement of the discharged employees with full backpay. *Wellman Industries, Inc.*, 248 NLRB 325 (1980), and *Wellman Industries, Inc.*, 222 NLRB 204 (1976).

I see no reason to differentiate between outright discharges and constructive discharges in 8(a)(5) cases any more than in 8(a)(3) cases. Thus, where an employer makes unilateral changes and requires employees to choose between accepting the unilaterally imposed changes and quitting their jobs, their subsequent quitting has been adjudged constructive discharges in violation of Section 8(a)(3) and (1). *Johnson Electric Company, Inc., etc.*, 196 NLRB 637 (1972). If, in the instant case, Boutin had simply chosen to work the usual 5-day week instead of the new unilaterally imposed 6-day week and had been fired for it, her case would have been on all fours with cases cited above. She chose instead to quit rather than submit to the newly implemented, unlawful, unilaterally imposed working conditions. I find that, unless Respondent's defenses, discussed *infra*, require a different conclusion, the General Counsel has proven a *prima facie* case.

C. *Respondent's Defenses*

Respondent's first defense is that the charge and the complaint should be dismissed because the General Counsel failed to show that the Union is a "labor organization" with which the bank has a duty to bargain.

The short answer to this defense is that the Union was determined in *Fall River Savings Bank, supra*, to be a labor organization within the meaning of Section 2(5) of the Act.

Respondent's second defense is that the charge and the complaint must be dismissed because the bank was not permitted to litigate the question whether the Union's certification was proper.

The question of whether or not the Union's certification was proper was fully treated in *Fall River Savings Bank, supra*, by the Board and by the United States Court of Appeals in 649 F.2d 50, *supra*.

Respondent's third defense is that the May 5, 1980, revisions to the bank's Saturday work scheduling policy did not constitute a unilateral change in violation of the Act, Section 8(a)(1) or 8(a)(5).

a. *The revision was within the bank's normal procedure concerning Saturday work policies*: This defense is partly based on Respondent's view of the facts wherein, in its brief, it contends that the memorandum of May 5, 1980, in which it revised its scheduling policy, was merely a variation of past practices and not a unilateral change in violation of Section 8(a)(5) and (1). I disagree, and find that it was a substantial change in unit employees' working conditions to force employees scheduled to work on Saturdays to work a 6-day week instead of giving them the option of either taking a day off in the middle of the week and working a 5-day workweek or working a 6-day week with time-and-a-half for Saturday work. This very substantial change in working conditions amounted to a conversion from voluntary to mandatory overtime and if done unilaterally has been found to constitute a violation of the Act. *Wellman Industries, Inc., supra*. Moreover, there is no basis in the record for assuming that some of the past changes made by the Employer would not have also been subject to negotiation before implementation and the law is clear that the Union's failure on these occasions to challenge any unilateral change or to exercise its statutory right does not constitute a clear and unequivocal waiver of its rights for all time. *Miller Brewing Company*, 166 NLRB 831 (1967), affd. 408 F.2d 12 (9th Cir. 1969). Indeed, the facts in the instant case, as they refer to Boutin,[12] indicate a sudden, abrupt change in her hours of employment whereby from May 1979 through May 1980 she worked a 5-day week, or less, every week except for the six times when unusual circumstances required her to give up her weekday day off. I find, therefore, that the change in working conditions made in pursuance of the May 1980 memorandum was substantial and not merely a variation of established past practices.[13]

b. *The scheduling flexibility contained within the bank's policy and the revision of May 5, 1980, mitigated its effects so as to make the change too insubstantial to constitute an unlawful unilateral change*: Respondent's brief argues that historically Respondent has made exceptions to its scheduling and that its work schedule has always been flexible. Respondent contends that the May 5 revisions did not alter the bank's policy of flexibility. The implication is that, if any employee felt that it could not work a 6-day week,[14] Respondent was willing to make allowances.

This defense appears to me to be without factual support, quite obviously an afterthought and in any case irrelevant for clearly the May 5 memorandum established a break with the past which from that time on prevented employees who worked Saturdays from substituting a weekday off for Saturday work. Pointedly, the memorandum did not say anything about flexibility or about exceptions being made. This was clearly a new procedure which said nothing about assistant branch managers being exempt from the new rule. On the contrary the memorandum stated specifically: "Beginning May 12, 1980, 'days off' for Saturday work will not be permitted . . . . For the smooth operation of the branches, all managers, assistants and tellers must work their share of Saturdays. Please note that all Managers, Assistant Managers and Tellers must work *at least one Saturday* per month but *may be designated* to work more than one." Thus, the memorandum, far from inviting discussion on the subject, clearly indicates that the midweek day off no longer existed and that Saturday work, i.e., a 6-day workweek, was obligatory at least once and could "be designated" for more than 1 week per month. If management was attempting to indicate that "flexibility" was the theme of this memorandum or that "exceptions" would be made in hardship cases, I, myself, would not have read it that way. Rather, to me, it appears a cut-and-dried dictate,[15] announcing a complete break with the past.

But, if one were to assume, *arguendo*, that the May 5 memorandum really did not mean what it appears to say but rather that any employee, including Boutin, who wished to continue to work a 5-day week instead of 6 only had to say so, why then when Respondent received Boutin's resignation did not Silva tell her that the rule was flexible and that an exception could be made in her case. Boutin's resignation was abundantly clear:

> As of the memo we received on Friday, overtime is now mandatory and I do not wish to work a six-day week.

When Silva received this note, if in fact the 6-day week was *not* mandatory she should have disabused Boutin of

[12] As reflected by her personnel records (Resp. Exh. 2). No other employees' records were offered for comparison.

[13] I find *KDEN Broadcasting Company, a wholly owned subsidiary of North American Broadcasting Company, Inc.*, 225 NLRB 25 (1976); *Highland Avenue Convalescent Home, Inc.*, 220 NLRB 998 (1975); and *Kal-Die Casting Corporation*, 221 NLRB 1068 (1975), all cited in Respondent's brief, clearly distinguishable on the facts.

[14] Respondent's brief emphasizes the Saturday work issue when in fact the 5-day workweek is the real problem here. For a full year prior to the issuance of the May 5 memorandum, Boutin worked almost every Saturday. The memorandum did not change that substantially. What it did that caused the greatest problem was to do away with the midweek day off. This cancellation of time off substantially affected unit employees, notably Boutin.

[15] The listing of tellers had nothing to do with the rule that either the manager or the assistant manager, either one, had to be present on any given Saturday. And the fact that Sue Almeida filled in for Boutin after she announced her resignation cannot be legitimately relied on as meaning that had Boutin not resigned she could have had Almeida or some other teller take her place any Saturday. The argument, in the face of the record, cannot be taken seriously.

her supposed misconception and told her that she did not have to work 6 days. In short, the May 5 memorandum left no room for flexibility and Silva's reaction to Boutin's resignation, namely, silence, proved it.

There is, however, in addition, another consideration here. Respondent implies that Boutin was at fault and had waived her right to exceptional consideration by not pursuing the matter to its ultimate before submitting her resignation. This begs the question, for a majority of employees in the unit of which Boutin was a member voted to be represented by the Union concerning wages, hours, and working conditions. They did not *reject* representation. This being the situation, Respondent cannot, after refusing to bargain in violation of Section 8(a)(5) and (1) of the Act with Boutin's lawfully designated agent for purposes of collective bargaining, now be heard to say that she waived her rights because she failed to bargain on her *own* behalf.

I conclude, in short, that the unilateral change instituted by Respondent pursuant to its memorandum of May 5 was not too insubstantial to constitute an unlawful unilateral change. I also find that Boutin was not required under the circumstances to pursue the matter any further than she did and her failure to do so was not a waiver of her rights.

(c) *The May 5, 1980, revisions amounted to no change as to managers and assistant managers*: Respondent contends that the revisions contained in the May 5 memorandum reflected only its overriding policy that either a manager or assistant manager had to be present at all times and that since Boutin had worked six 6-day weeks of 37 weeks since the "day-off" policy commenced and it was not expected that her share would increase under the revision, the revision amounted to no change at all and was irrelevant insofar as it affected her and other assistant managers and managers.

In answer to this particular defense it need only be reiterated, as discussed above, that no offer of a flexible schedule was offered by the May 5 memorandum or by Silva when she received Boutin's resignation. Indeed, all credible evidence clearly indicates that no flexibility to the newly instituted rule was contemplated. With that finding as the starting point, if one were to consider the fact that Boutin in 1979 worked from the week ending May 25 to the end of the year every Saturday and took off 1 day in the middle of each week, except for 4 weeks because of exceptional circumstances, it appears quite apparent that, having worked 26 5-day weeks out of 30, Boutin can be considered to have been on a 5-day schedule throughout the latter half of 1979. Further, if one were to consider the fact that Boutin in 1980 worked from the first of the year to the date of the memorandum every Saturday and took off one day in the middle of each week, except for 2 weeks because of exceptional circumstances, it is conclusively shown that, having worked 17 5-day weeks out of 19, Boutin can be considered to have continued on a regular 5-day schedule until May 5, when it was abruptly and unilaterally changed to a 6-day workweek. Thus, Respondent's argument that the May 5 revisions amounted to no change as to assistant managers is transparentally an exercise in sophistry hardly worthy of serious consideration.

(d) *The Union's failure ever to request bargaining over the revision waived any union claim that the bank refused to bargain*: Respondent cited several cases[16] to support its contention that "for a union to bring an unfair labor practice claim that an employer has refused to bargain over an issue and instead unilaterally has changed employment conditions, it must have first requested that the employer bargain over the change." These cases, however, are clearly inapposite for, in each case cited, the employer had recognized the union involved and was negotiating with it. By so doing, the employer, in each situation, effectively put the union on constructive notice that it would be amenable to negotiations over any changes in working conditions contemplated. In the instant case, although the Union requested bargaining and specifically advised the Employer by letter that hours of employment was one of the subjects about which it wished to negotiate, Respondent refused to recognize the Union as the exclusive bargaining representative of its employees and rejected all efforts by the Union to obtain recognition and to negotiate. Inasmuch as Respondent specifically refused to recognize the Union as the exclusive bargaining representative and refused to bargain with it concerning conditions of employment of its employees in violation of the Act, it cannot now claim that the Union waived its rights. It would certainly have been a pointless exercise in futility for the Union to have requested negotiation concerning the unilateral change in hours when Respondent had already given notice that it did not consider the Union the exclusive bargaining representative of its employees for any purpose and had rejected all attempts by the Union to undertake a bargaining relationship. I find, contrary to Respondent's position, that the Union did not waive any of its rights by failing to request bargaining over the specific issue of the unilateral change resulting from the issuance of the May 5 memorandum.

Respondent's fourth defense is that Boutin's resignation was a voluntary quit, not a constructive discharge.

(a) *There is no evidence whatsoever of any antiunion motivation by the bank or of any desire to force the discharge of Louise Boutin*: The simple answer to this defense is that case law on the subject is clear; i.e., a change in work schedules made unilaterally is a violation of Section 8(a)(5) and (1) even in the absence of a showing of bad faith. *Wellman Industries, Inc., supra; Florida Steel Corporation*, 235 NLRB 941 (1978), affd. in relevant part 101 LRRM 2671 (4th Cir. 1979).

(b) *The few Board Decisions concerning 8(a)(5) constructive discharges not prosecuted under Section 8(a)(3) establish a standard requiring that a unilateral change constitutes a flagrant contract repudiation to turn a quit into a constructive discharge*: Respondent, in support of the above contention, cited *Film Projects, Inc., etc.*, 231 NLRB 1370 (1977). Although the Board in that case did find that the employer at one point adopted the contract of its predecessor and applied the going wage rate con-

[16] *The City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *Globe-Union, Inc.*, 222 NLRB 1081 (1976); *American Buslines, Inc.*, 164 NLRB 1055 (1967); *Citizens National Bank of Willmar*, 245 NLRB 389 (1979).

tained therein to its employees, the later unilateral change in the wages paid to said employees had nothing to do with the earlier contract, but was in and of itself the basis for the finding of a violation. The mention of the earlier contract served merely to indicate the existence of a bargaining relationship between the labor organization and employer in that case. In short, whether or not a contract, written, oral, or implied exists is not the measure of the violation. Rather, it is the sudden and abrupt unilateral change in working conditions initiated by the employer without prior consultation with the exclusive collective-bargaining representative of the affected employees that marks the touchstone of the violation. To hold otherwise would result in punishing *only* those employers who signed collective-bargaining agreements and later breached them while ignoring employers like Respondent who refuse to recognize a lawfully elected collective-bargaining representative and reject *in toto* the collective-bargaining principle in favor of making only unilateral decisions in its day-to-day management of working conditions. That is hardly what effectuation of the National Labor Relations Act requires and I reject Respondent's position on this score. As far as flagrancy is concerned, the unilaterally instituted change in working conditions instituted by Respondent herein, the change from voluntary to mandatory overtime, is clearly flagrant[17] enough to require a remedial order. *Wellman Industries, Inc., supra.*

(c) *Louise Boutin's resignation does not constitute a constructive discharge by the bank even if the May 5, 1980, revision was a unilateral change violative of Section 8(a)(5) of the Act*: This defense is based on the proposition that, even if the change brought about by the issuance of the May 5 memorandum were violative of Section 8(a)(5), the revision in Boutin's working conditions was too insubstantial to make her resignation into a constructive discharge for which Respondent is responsible.

In my opinion the change in Boutin's working conditions whereby she was forced to work a 6-day week was no minor matter. She had fought against the 6-day week over a long period of time, and having that day off in the middle of the week in order better to care for her child was extremely important to her. Her objection was not in any respect frivolous and her decision to quit her job was of very serious import. I do not believe that a unilateral change in working conditions must result in making it impossible for an employee to work before an 8(a)(5) violation is made out or before a resultant quit is considered tantamount to a constructive discharge. This is not the criterion used when adjudging 8(a)(3) constructive discharges nor should it be so adjudged under Section 8(a)(5). It is quite obvious that Boutin was put at a tremendous personal disadvantage by the unilateral change instituted by Respondent and had she had the support of the representation to which she was entitled she might well have remained with Respondent as a trusted and valuable employee.

Respondent argues that Boutin worked between 11 and 16 percent of her weeks, 6 days per week. Without conceding this to be the case, working 1 or 2 weeks out of 10 on a 6-day schedule is a far cry from working a 6-day week every other week, and for that reason the argument holds little persuasiveness. Respondent, in its brief, argues: "By accepting the promotion to assistant manager, she had already substantially increased her 6-day weeks despite the 'day off' policy, and there is no reason to be certain that the revision would add more." This statement, the record indicates, is not true for throughout 1980, from January 1 through the date of her resignation, Boutin worked only one 6-day week. Every week except for that single exception Boutin worked 5 days or fewer, and in each of those weeks she worked Saturday and had a day off during the week.[18] The memorandum of May 5 was absolutely clear. There would be no further weekdays off and Boutin as an assistant branch manager would be expected to work her share of Saturdays. Thus, from the memorandum a certain number of 6-day weeks would be required of her. Respondent's argument is purely an afterthought concocted obviously for purposes of litigation. Similarly, Respondent's argument that "Boutin quit without attempting to give the bank the opportunity to adjust the system to her needs" to give the bank simply flies in the face of the facts. Whereas the employees in the cases[19] cited by Respondent quit their respective jobs without advising their employers of the reasons they were quitting and thus gave them no opportunity to correct the situation which grieved the employees, in the instant case Boutin not only clearly spelled out that she was quitting because of the newly imposed 6-day workweek but also gave Respondent 2 weeks' notice during which it could have advised her that she would not be required to work 6 days. During that 2-week period Respondent could have given Boutin all of the assurances which it belatedly included in its brief to me. It never did so, quite obviously because it never intended to offer Boutin any special consideration but on the contrary intended to force her along with everyone else in the unit to abide by the changes in working conditions unilaterally instituted through the issuance of the May 5 memorandum.

To summarize the above, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees on December 20, 1979. Rather than bargain in good faith with the duly elected certified bargaining representative of its employees, however, it rejected the principle of collective bargaining in violation of Section 8(a)(5) and (1) of the Act, denied recognition to the Union, and refused to meet with it in order to negotiate toward a collective-bargaining agreement. As of the date of the hearing, January 15, 1981, over 2 years later, the employees in the unit were still being denied the privilege of representation to which they were enti-

[17] Respondent cites *John Hutton Corp., d/b/a KUMU Radio AM/FM*, 213 NLRB 73 (1974), for the proposition that, where a unilateral change in hours of work is made, and an affected employee quits as a result, it is not considered a constructive discharge where there exists no compelling reason which precluded that employee from working the new schedule. I find the cited case inapposite because of the several other factors relied on by the Board in that case which are not present here and because, in any event, in the instant case Boutin's reason for not wanting to work a 6-day week, i.e., a sick child, is, in my opinion, compelling.

[18] Resp. Exh. 2.

[19] *New Castle Lumber and Supply Co.*, 203 NLRB 937 (1973), *C. Markus Hardware, Inc.*, 243 NLRB 903 (1979).

tled. Throughout this period Respondent completely controlled the working conditions of the employees in the unit and on May 5, 1980, drastically changed the working conditions of the employees in the unit by unilaterally eliminating compensatory time off for overtime worked on Saturdays and requiring paid Saturday overtime, thus converting a voluntary overtime schedule to a mandatory overtime schedule, without giving prior notice to or bargaining with the Union. As a result of the hardship visited upon one of the employees in the unit, Louise Boutin, as a consequence of the unilateral change, she was forced to quit her job with Respondent. By refusing to recognize the Union and bargain with it concerning the changes in schedule and unilaterally instituting these changes, Respondent did so at its peril. By denying Boutin and other employees their lawful right to representation, Respondent effectively denied them any benefits to be derived from such representation. Although it would be speculative to consider what the outcome of negotiations might have been had Respondent bargained with the Union in good faith concerning the possible changes in scheduling, it would appear, in light of Respondent's oft-repeated assertions throughout the hearing and in its brief that it was flexible on the issue, that there was the definite possibility that a solution to the problem could have been negotiated without the necessity of instituting a program of mandatory overtime. Perhaps exceptions for hardship cases could have been negotiated. This we will never know. We do know, however, that it was as a result of Respondent's adamant refusal to recognize and bargain with its employees' certified representative that good-faith bargaining was never given a chance. I believe that the cause of justice could better be served by finding here that Boutin's resignation, which occurred as a direct result of Respondent's unlawful unilateral institution of the 6-day workweek, was a constructive discharge and by issuing an order remedying that wrong than by permitting Respondent to violate the Act with impunity by rejecting the concept of collective bargaining, denying to its employees the rights and privileges of representation, and unilaterally making changes in working conditions to the detriment of these employees in total disregard of their rights as guaranteed by the Act.

CONCLUSIONS OF LAW

1. Fall River Savings Bank is an employer engaged in conmerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union, Local No. 1325, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular full-time and part-time employees employed by Respondent in its offices at 141 Main Street, Fall River, Massachusetts, 397 Rhode Island Avenue, Fall River, Massachusetts, 782 Main Road, Westport, Massachusetts, 63 South Main Street, Assonet, Massachusetts, County Street, Somerset, Massachusetts, and K-Mart Plaza, Swansea, Massachusetts, but excluding the president, vice presidents, assistant vice presidents, treasurer, assistant treasurers, branch managers, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 20, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally eliminating compensatory time off for overtime worked Saturdays and unilaterally instituting a required 6-day workweek, without prior notice to or bargaining with the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By constructively discharging Louise Boutin by forcing her resignation because of the unilateral institution of the 6-day workweek without first notifying and bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent be ordered to cease and desist from unilaterally instituting a mandatory 6-day workweek for employees in the bargaining unit without notifying and bargaining with the Union about such matters.

In addition, it will be recommended that, if requested by the Union to do so, Respondent rescind the unilaterally instituted mandatory 6-day workweek and reinstitute the practice of permitting compensatory time off for overtime worked Saturdays.

Finally, it will be recommended that Respondent, having illegally constructively discharged Louise Boutin, offer her full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Fall River Savings Bank, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall:

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Unilaterally eliminating compensatory time off for overtime worked Saturdays and unilaterally instituting a mandatory 6-day workweek, without prior notice to and bargaining with the United Food & Commercial Workers Union, Local No. 1325, AFL–CIO–CLC.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) If requested by the Union to do so rescind the mandatory 6-day workweek and reinstitute the practice of permitting compensatory time off for overtime worked Saturdays.

(b) Offer to Louise Boutin immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered in the manner set forth in the section hereof entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its various locations[22] copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the appropriate representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and be maintained by Respondent for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

---

[22] See locations listed in the unit description, par. 3, Conclusions of Law, herein.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."